Supreme Court, U.S.
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No. 94-1373

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER Term, 1994

DALE E. REICH,

Petitioner,

v.

MICHAEL SPELLMAN, ASSISTANT CHANCELLOR, UNIVERSITY RELATIONS, UNIVERSITY OF WISCONSIN-WHITEWATER, JAMES R. CONNOR, FORMER CHANCELLOR, UNIVERSITY OF WISCONSIN-WHITEWATER, AND BOARD OF REGENTS OF THE UNIVERSITY WISCONSIN SYSTEM,

Respondents.

Petition for a Writ of *Certiorari* to the Court of Appeals for the State of Wisconsin, District II

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the state court of appeals properly affirm the grant of summary judgment to the respondents on the ground of qualified immunity on the petitioner's federal claim of retaliation in violation of 42 U.S.C. §1983?

The respondents believe that the petitioner improperly frames the questions presented because: 1) the state law claim is not properly before this court, making petitioner's questions II.A. & B. superfluous; 2) petitioner's question I.A. confuses the substantive test for unlawful retaliation on the merits with the test for qualified immunity; 3) petitioner's question I.B. is so laden with distorted or incomplete facts that it bears little relation to the case at bar; and 4) petitioner's question I.C. improperly attempts to inflate a state law procedural question into a question of federal law.

LIST OF PARTIES

The Board of Regents of the University of Wisconsin System is an agency of the State of Wisconsin, and as such is not a person within the meaning of 42 U.S.C. §1983. The Board of Regents was a party in the petitioner's state law claim, but was not a party in the federal law claim.

STATEMENT OF THE CASE

The respondents make this statement of the case to correct inaccuracies and omissions in the statement of the petitioner. The petitioner's statement of facts passes off argument and conclusion as fact, and omits facts in the record not helpful to petitioner's cause.

Please note that nearly the entire record in this case is made up of statements by the petitioner in two depositions and in two subsequent

critical of Reich's performance and resulted in a less than average pay increase for Reich (Id.). On June 19, 1990, Reich wrote a rebuttal to Spellman's evaluation of him and on it he indicated that a copy of his response was being sent to his attorney, Russell Devitt (Rec. 21:287, 325; Exhibit 21), who represents petitioner before this Court. Reich had been in regular contact with Attorney Devitt about his job situation (Rec. 21: 327). It is against this omitted scenario that the remaining facts developed.

The third paragraph of petitioner's statement (Pet. at 3), which deals with respondent Spellman's alleged "policy" of "conditioning" "university" business on contributions to the auditorium fund raising campaign, is unfairly misleading for having omitted the following facts.

At his deposition petitioner Reich claimed that in the spring of 1990, Spellman told Reich that The Register would not get the printing business for Whitewater Today because they did not make a sufficient contribution to the auditorium project (Rec. 21:343). He advised Reich that "They don't have to know that" (Id.) If asked Reich was to tell The Register only that they were unhappy with the quality of the printing, which was true (Id). Reich thought the Register's printing problems were sufficient to take the business elsewhere (Rec. 21:396). Reich believed that telling them only half the truth was wrong, but said nothing to Spellman or Connor about it (Rec. 21:344-45). Reich did not contact The Register to tell them about this wrongdoing (Rec. 21:347). He did not contact the District Attorney's

office, law enforcement or anyone else (Rec. 21:366, 384). He could not say there was anything unlawful in conditioning business upon contributions; only a personal sense of moral repugnancy (Rec. 21:340-42).

Despite Spellman's alleged threats to withdraw their business, The Register continued to print the summer 1990 and winter 1990-91 issues of Whitewater Today (Rec. 21:351, 352). Reich believed that since The Register was allowed to print two issues of Whitewater Today, after refusing to contribute, Spellman's "policy" against using them changed (Rec. 21: 354). At his deposition petitioner Reich further admitted that he really did not believe there was such a "policy" at the time The Register lost the business (Rec. 21:392-93).

The fourth paragraph of petitioner's statement (Pet. at 3) avers that petitioner was told to "lie" and explain that the loss of business "was based solely on poor quality of work." The averments are unfairly misleading because petitioner omits evidence in the record demonstrating the chronic quality problems with the printer in question, and petitioner's role in convincing respondent Spellman to find a new printer.

As far back as 1986, one of Reich's responsibilities as Director of News and Publications, was to edit and have published the newspaper of the University of Wisconsin-Whitewater Foundation, an alumni association, known as the Whitewater Today (Rec. 20:181; Exh. 13:4; Exhibit 14). On August 8, 1989, at a meeting of the University Relations staff,

Reich first informed Spellman that the quality of printing of the Whitewater Today needed to be improved (Rec. 21:496-498; Exhibit 37). According to Reich, Whitewater Today had printing problems with The Register dating back to 1986 (Id.). The quality of the photographs needed to be improved (Id.). Reproduction was poor (Rec. 21:555).

The printing problems continued. At a University Relations staff meeting on August 13, 1990, Reich reported that he was still not satisfied with The Register's printing of the Whitewater Today (Rec. 21:515-516, 519) . According to Reich, the picture quality was poor and printing decisions were made without consulting him first (Id.). Reich was going to solicit three new bids from printers for the next issue of the Whitewater Today (Id). Reich was the one who wanted to change printers, not Spellman (Rec. 21:Exhibit 41; 21:535-536).

On August 13, 1990, Spellman authorized Reich to begin the process of obtaining a new printer for the Whitewater Today (Rec. 21:Exhibit 41). Since the University of Wisconsin-Whitewater Foundation, a private foundation, and not the University, paid for the printing of the Whitewater Today, the printing was not subject to state bidding laws (Rec. 21:530-531). Reich agreed that the Foundation could give its business to people who contributed to the Foundation and found nothing wrong with this (Rec. 21:531-532).

The fifth paragraph of petitioner's statement (Pet. at 3-4) avers that the printer was denied the opportunity to

"bid" on a "contract" with the "university." This paragraph is unfairly biased and misleading because, as referenced elsewhere herein: 1) the printing business in question was that of the UW-Whitewater Foundation, a private non-profit corporation, and no university business was ever at stake; and 2) there was no "contract" or "bids" received, with the Foundation simply taking its business where it wanted to; 3) it implies, without directly stating, that any printing quality problems were negligible, if not non-existent; and 4) it fails to acknowledge that petitioner had never complained about legality or ethics to respondent Spellman, to respondent Chancellor Connor, to anyone else in the university system, or to any law enforcement or governmental oversight agency prior to divulging what he was instructed not to divulge to the printer.

In the Fall of 1990, petitioner Reich received a telephone call from Tom Coe of The Register, asking why The Register did not receive the printing job for the Fall issue of the Whitewater Today (Rec. 21:387-388). Reich told Coe that it was because of the printing problems (Id.). According to Reich, the printing problems the Whitewater Today had with The Register were sufficient alone to justify canceling the contract (Id.).

Later, Reich called Coe back and told him that there were two reasons why The Register did not get the printing business (Rec. 21:388-389). One was the printing problem and the other was the lack of sufficient contribution to the auditorium fund (Id.). By the time of this conversation with Coe, Reich had never

confronted Spellman with his opinion that conditioning business upon contribution was immoral, nor had he voiced such concern to Connor, Spellman's supervisor (Rec. 21:387).

The sixth paragraph of petitioner's statement (Pet. at 4) is unfairly biased in that it is not an assertion of fact with citation to the record, but merely an argument wherein the petitioner congratulates himself for making only a limited disclosure.

The seventh paragraph of petitioner's statement (Pet. at 4) is unfairly deceptive because, as referenced elsewhere herein: 1) it omits the fact that even after the disclosure to the printer petitioner failed to inform the respondents of his feelings or of his conversations with the printer; 2) the paragraph unfairly implies that the respondents' anger was directed solely at the fact of petitioner's disclosure rather than at his duplicity both before and after the disclosure; and 3) it alleges a "progressive series of retaliatory actions" while omitting important facts in the sequence of events tending to disprove the assertion.

Reich first mentioned the contribution issue to Spellman during an October 26, 1990, meeting that Spellman had convened to discuss the matter of Reich's disclosure (Rec. 21:556-557). Spellman, Reich, Coe and Howard Marklein were at that meeting (Id.). After the meeting ended, Spellman chastised Reich for having previously told Coe about the contribution issue (Id.). Spellman stated "You knew you could have told them just

the printing problem; you didn't have to breach a management confidence" (Rec. 21:557).

At his deposition petitioner Reich admitted the following adverse consequences to his working relationship with respondent Spellman. In the Fall of 1990, the work relationship between Reich and Spellman was tense, they avoided each other, and they did not speak (Rec. 21:412-413). Spellman no longer confided in Reich (Rec. 21:414). This situation had a negative impact on the staff (Rec. 21:561). They were under stress and the situation between Reich and Spellman was disruptive to the office (Rec. 21:464).

On or about November 16, 1990, Reich had a meeting with Spellman and Connor (Rec. 21:387). At this meeting, for the first time, Reich told Spellman and Connor that he believed Spellman's conduct concerning the contribution issue and The Register was wrong (Id.). Petitioner Reich admitted that no one threatened to fire or demote him (Rec. 21:416).

On or about November 19, 1990, Reich submitted a letter of resignation from the University to Connor, giving no reasons for his decision (Rec. 21:330-31; Exhibit 22). Petitioner Reich further admitted that the resignation was not prepared in response to any threat by Spellman or Connor that they were going to fire him (Rec. 21:333). Petitioner Reich admitted that he was never threatened with discharge or demotion for revealing information to Coe and suffered only a verbal reprimand prior to resigning (Rec. 21:547).

The petitioner's seventh paragraph concludes with an assertion that the second specific act of retaliation was "involuntary physical relocation" to "a converted storage space," and cites to his own affidavit, Appx. D (at 6-7), as authority. Please note that neither these pages nor any other in the affidavit anywhere mention the event.

The eighth paragraph of petitioner's statement (Pet. at 4-5) is accurate insofar as it acknowledges that the only consequence for petitioner's entire course of conduct was a verbal reprimand and instruction that if he wanted to work for respondent Spellman he must obey his orders. It is unfairly misleading, as referenced elsewhere herein, in that: 1) it minimizes and distorts the fact that petitioner unequivocally resigned as Director of News and Publication; and 2) it misrepresents documents proving that respondent Chancellor Connor's offer to find other university employment was gratuitous, contingent upon availability, and never understood to mean "comparable employment" or pay equal to the position petitioner was resigning.

A week after submitting his resignation Reich and Connor met to discuss the resignation (Rec. 21:368-69). Connor stated that he would not accept the resignation and would attempt to find another job for Reich at the University (Id.). Reich agreed with Connor's compromise (Id.). But Reich did not tell Connor what kind of job he wanted or where he wanted to work (Rec. 21:369). In December of 1990, Reich established an attorney/client relationship with Attorney Devitt over this situation (Rec. 21:401).

In subsequent meetings with Connor in December of 1990 and January of 1991, Connor suggested looking for employment for Reich in the Communications Department and Continuing Education (Rec. 21:371-75). Although Reich was agreeable to working in either of these areas, Connor could not find positions for Reich there (Id.). Reich was disappointed that Connor could not place him in Continuing Education as he had applied for this job twice before (Rec. 21:377).

Between November 19, 1990, and January 31, 1991, Reich did nothing whatsoever to identify jobs on campus he was interested in, nor did he visit the placement office to look for work or send out resumes soliciting work (Rec. 21:407). Petitioner Reich further admitted at his deposition that he never gave respondent Connor any salary requirements he had for a new job (Rec. 21:376). Through June 30, 1991, Reich did nothing to help Connor find employment for him on campus because he expected Connor to do the looking for him (Rec. 21:418). Reich acknowledged at his deposition that he did not know of any areas where Connor could have looked for work for him where he did not look (Rec. 21:419).

By letter dated January 31, 1991, Connor informed Reich that he was unable to find a job on campus for him and was accepting his November 19, 1990, letter of resignation "from the University of Wisconsin-Whitewater" in its entirety (Pet. Appx. at E-11, E-12; Rec. 21:400; Exhibit: 23). Reich's last day of employment was to be June 30, 1991, rather than January 31, if Reich was agreeable (Id.). This was both to give petitioner

time to seek alternative employment, and a last chance for respondent Connor to find an alternative position at the university (Id.). The Wisconsin trial and appellate courts below have both held that this letter started the 120 day notice of claim clock under state law.

The ninth paragraph of petitioner's statement (Pet. at 5) is unfairly deceptive because it mischaracterizes or omits altogether documentation that proves the historical facts.

On or about February 1, 1991, Reich was transferred to a new office in another building away from Spellman (Rec. 21:415).

By memo dated February 22, 1991, Reich objected to the proposed termination of his employment, claiming that his resignation had not been accepted (Pet. Appx. at E-14; Rec. 21:407-8; Exhibit 24). In this memo petitioner acknowledged that his resignation from the position under respondent Spellman was never in doubt, and that the only dispute was respondent Connor's alleged obligation to find him an alternative position:

> As you will recall, you indicated to me at our meeting in December that you were going to reject and destroy my letter of resignation. I indicated to you that I consented to that action, and would accept your offer to find me an <u>alternate</u> position on campus.
>
> As a result of that conversation, I do not consider the letter of resignation to be

> in effect. I continue to wait for my transfer to another office or unit on the UW-Whitewater Campus.

(Pet. Appx. at E-14; Rec. 21:407-8; Exhibit 24) (emphasis added).

In a letter dated February 27, 1991, Connor responded by reaffirming his January 31 letter (Pet. Appx. at E-16; Rec. 21:417-18; Exhibit 25). On or about March 11, 1991, Reich's job duties were reduced pending his June 30 departure from News and Publication (Pet. Appx. at E-18; Rec. 21: 420-21; Exhibit 26).

On April 2, 1991, Attorney Devitt sent a letter to respondent Connor, but failed to file a notice of claim, alleging that petitioner Reich's rights had been violated (Pet. Appx. at E-21, E-22; Rec. 21:421; Exhibit 27). In a letter dated April 8 Connor again reaffirmed his January 31 letter. (Pet. Appx. at E-24; Rec. 21:422-23; Exhibit 28).

In a May 7, 1991, letter Attorney Devitt again wrote to respondent Connor alleging that Reich was "whistleblower" and that the termination decision was without just cause (Pet. Appx. at E-26 through E-29; Rec.21:424; Exhibit 29).

As of May 31, 1991, 120 days had elapsed since respondent Connor's January 31, 1991, letter to petitioner Reich terminating his employment. Neither Reich nor Attorney Devitt had filed a notice of claim as required by sec. 893.82, Stats. Attorney Devitt had been involved with the case for almost a year (Rec. 21:287, 325, 327; Exhibit 21).

In a letter dated June 18, 1991, respondent Connor notified Reich that he had located a position for him in the Continuing Education Department as an Outreach Program Specialist, and offered it to him if he wanted it:

> I am writing to offer you the position of Outreach Program Specialist, for which you previously applied, effective July 1, 1991. You will be assigned to the Division of Continuing Education and Outreach ....

(Pet. Appx. at E-31, E-32; Rec. 21:424-25, 445; exhibit 30) (emphasis added).

The ninth paragraph of petitioner's statement (Pet. at 5) is unconscionably inaccurate in that it purports to quote respondent Connor as stating that petitioner Reich should "plan to report [to his new job] on July 1, 1991" . Yet neither of the citations to the record, Connor's letter and Reich's second affidavit, contain any such quotation.

Petitioner's ninth paragraph ends with a claim that "newly-appointed Chancellor Gaylon Greenhill ... indicated that Reich could either accept his reassignment or be fired" (Pet. at 5). Chancellor Greenhill, who replaced the retiring respondent Chancellor Connor on July 1, 1991, was never named as a party to this action.

The Outreach Program Specialist was a position similar to one Reich had applied for but not received a year earlier, in 1990 (Rec. 21:444; Exhibit 30). This was

the same position that Reich had earlier expressed an interest in and which Connor had unsuccessfully tried to secure for Reich in December of 1990 (Rec. 21:375). At no time from the point that Connor first tried to get this job for Reich in December of 1990 until the time the job was offered to him in June of 1991, did Reich ever tell Connor that he did not want this job (Rec. 21:461).

Whether or not petitioner Reich ever signed a contract he accepted the position even though it involved a salary of $35,995, as compared to $50,000 in News and Publication (Rec. 21:424-26, 431-32, 471; Exhibits 30 and 31). The $35,995 salary was the top of the pay range for this position and made Reich the highest paid Outreach Specialist in the Continuing Education Department (Id.).

At his deposition petitioner Reich admitted that he was treated well by and got along with his new supervisors, Mrs. Zahn and Dean Thomas McLeRoy, and his new co-workers (Rec. 21:451-452). No one in this job asked him to do anything wrong or morally repugnant (Id.).

Nevertheless, on October 8, 1991, Reich submitted his resignation from the university effective October 31, 1991 (Rec. 21:452-53; Exhibit 34). He did this despite advice from Dean McLeRoy that he should locate a new job before resigning from Continuing Education (Rec. 21:475). Reich's last day of employment with the University of Wisconsin-Whitewater was October 31, 1991 (Rec. 21:Exhibit 34).

Attorney Devitt and petitioner Reich finally filed a notice of claim on September 30, 1991, (Pet. at 6) 242 days after the January 31, 1991, acceptance of his full resignation.

Paragraphs ten and eleven of the petitioner's statement (Pet. at 5-6) are unfairly misleading in that they attempt to pass off argument that an "involuntary and arbitrary transfer" created a "fresh wrong" as fact.

The twelfth and thirteenth paragraphs of the petitioner's statement (Pet. at 6-7), which craft the argument that petitioner "reasonably believed" "state laws or bidding procedures" were violated, even if they weren't, are unfairly misleading because they ignore half the record. Plaintiff's admissions at his depositions as to what he thought and did at the time the historical events were occurring are cited above. Petitioner's affidavits (Pet. Appx. D & E) were created not only after the onset of litigation, but after the respondents filed for summary judgment and laid out their theory of the case.

The sixteenth paragraph of petitioner's statement (Pet. at 8-9) is unfairly misleading because it tries to pass off as "fact" the argument that the state law notice of claim issue is a question of federal constitutional law, while admitting in a footnote (Pet. at 8-9, n. 5) that this was not raised in the state courts below.

SUMMARY OF THE ARGUMENT

This case does not meet the criteria for granting a writ of certiorari. The essence of certiorari review is: 1) resolving conflicts on federal questions of law between the circuits or state courts of last resort; or 2) resolving novel questions of federal law. Neither is present in this case.

The state courts below did not make any new law in the area of qualified immunity. Both followed well-settled pronouncements by this Court and by the Seventh Circuit Court of Appeals, and merely applied that body of law to the facts of this case.

Petitioner's attempt at distorting the facts constitutes an implicit admission that absent same this case does not meet this Court's criteria. The gravamen of retaliation is excessive and punishing conduct following and motivated by speaking out on matters of public concern. The essential considerations are sequence of events and the putative victim's time, place and manner of speaking out. The negative evaluation omitted from petitioner's statement of facts radically shifts the light in which the case is cast. If petitioner's disclosure only came after a negative evaluation, it invites the inference that it was petitioner Reich "retaliating" against respondent Spellman. This thesis is fortified by the facts that: 1) petitioner Reich knew about respondent Spellman's alleged offensive "policy" before the negative evaluation, but made no disclosure until after it; and 2) petitioner made no complaint within the

chain of command before going outside. Whether or not this scenario would be determinative for the retaliation claim on the merits, it certainly made the qualified immunity issue easy for the courts below to decide.

Petitioner's state law claim involves no issue of federal law. The posturing of it as involving a federal question is based upon a gross distortion of the facts not supported by the record. Moreover, the courts below decided the issue consistent with both state law and this Court's prior rulings. And finally, the issue of the constitutionality of the state notice of claim statute was never raised below.

ARGUMENT

I. THIS CASE DOES NOT MEET THE CRITERIA FOR GRANTING A WRIT OF CERTIORARI.

The state court of last resort, the Wisconsin Supreme Court, determined that this case was significant enough to merit discretionary review. The state court of appeals has not decided the one and only federal question, qualified immunity, in a way that conflicts with this Court or the Seventh Circuit Court of Appeals. The law of qualified immunity has already been well settled by this Court, and the decision in this case is consistent with those rulings. The petitioner's argument that the state courts errored, absent more, is not sufficient to merit this Court's review.

II. THE RULINGS OF THE STATE COURTS BELOW GRANTING QUALIFIED IMMUNITY TO THE RESPONDENTS ARE CONSISTENT WITH WELL-SETTLED FEDERAL LAW ON QUALIFIED IMMUNITY.

Government officials performing discretionary functions are shielded from damage liability insofar as their conduct does not violate clearly established statutory or constitutional rights. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The general rule is immunity; the law intends that liability is to be the exception. Rakovich v. Wade, 850 F.2d 1180, 1205-06, 1209-10 (7th Cir. 1988), cert. denied, 109 S. Ct. 497 (1988). It is the plaintiff's burden to prove that an exception exists. Id. at 1209; Davis v. Scherer, 468 U.S. 183, 197 (1984). The plaintiff has the burden of demonstrating the existence of a "clearly established" right. See Mitchell v. Forsyth, 412 U.S. 511, 526 (1985); Anderson v. Creighton, 483 U.S. 635, 640 (1987).

This showing must be made by reference to case law. Rakovich, 850 F.2d at 1209, 1212. The plaintiff must make this showing by overwhelming authority; if reasonable minds could disagree the right could not be said to have been clearly established. Id. at 1207-10, 1214. "[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized." Malley v. Briggs, 475 U.S. 335, 341 (1986).

In addition, it should be emphasized that breaching the defense requires that the right be clearly established in its own particular factual context by

922 F.2d at 383 (citations omitted; emphasis added).

> Government has some interest in inducing employees to think about the consequences of their public speech - social workers ought to preserve confidences and speak dispassionately, even if the first amendment allows them to do otherwise. . . . This interest may justify a measured response even if it is not enough to hurl the offender onto the street.

922 F.2d at 384 (citations omitted; emphasis added; italics in original).

> As the disagreement among the judges . . . shows, questions about the extent to which public employers may take speech into account remain the subject of debate. Immunity lifts from the shoulders of public employees the onus of predicting the outcome of these debates.

922 F.2d at 385 (emphasis added).

In Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983), cert. denied 464 U.S. 918 (1983), the court stated:

> The First Amendment protects the right of a government employee to make good faith accusations of malfeasance in office against fellow workers, but the First Amendment does not guarantee the employee a cost-free exercise of that right.

710 F.2d at 322 (citation omitted; emphasis added).

III. THE PETITIONER'S ARGUMENT CONFUSES THE TEST FOR QUALIFIED IMMUNITY WITH THE TEST FOR RETALIATION ON THE MERITS.

The petitioner's argument largely misses the point. The respondents were granted summary judgment solely on the ground of qualified immunity (on the federal law claim). But the petitioner's argument focusses on the balancing of the employer's interests against those of the employee under Pickering v. Board of Education, 391 U.S. at 563. The respondents could virtually concede retaliation on the merits without necessarily losing qualified immunity.

Note that petitioner essentially only says that the court of appeals reached the wrong result in applying the Pickering or Connick v. Myers, 461 U.S. 138 (1983) factors. He does not argue that the court ignored the test, or created a new one in conflict with established case law. The criteria enunciated in Rule 10 of the rules of this court remain unmet.

IV. A FINDING OF QUALIFIED IMMUNITY IS COMPELLED WHEN APPLYING THE WELL-SETTLED LAW TO THE FACTS OF THIS CASE.

The facts make it at least arguable that petitioner's disclosure, which would necessarily embarrass Spellman because it

indulge every fact presumption necessary to help a statute stand. Wis. Bingo Sup. & Equip. Co. v. Bingo Control Bd., 88 Wis. 2d 293, 301, 276 N.W.2d 716 (1979); Racine Steel Castings v. Hardy, 144 Wis. 2d 553, 560, 426 N.W.2d 33 (1988).

The burden of proof and presumption change only if a statute impinges on a suspect classification or a fundamental right. See Clark v. Jeter, 486 U.S. 456, 461 (1988). No suspect classification or fundamental right is involved in this case.

The granting of limited immunities to certain classes of defendants does not constitute a suspect classification or violate a fundamental right. The Wisconsin Supreme Court has expressly rejected the notion that classifications among different groups of tortfeasors should be subjected to strict scrutiny. State ex rel. Strykowski v. Wilke, 81 Wis. 2d 491, 507, 261 N.W.2d 434, 442 (1978). See also Duke Power Co. v. Carolina Environ. Study, 438 U.S. 59, 83 (1978).

The only other factor that can affect a rigid application of the time limits is procedural due process. In Ocampo v. Racine, 28 Wis. 2d 506, 137 N.W.2d 477 (1965), the court determined that procedural due process was not violated. This notice requirement has been upheld against serious constitutional challenge in all other respects. See Mannino v. Davenport, 99 Wis. 2d 602, 614-15; 299 N.W. 2d 823 (1981); Yotvat v. Roth, 95 Wis. 2d 356, 362-69, 290 N.W.2d 524 (Ct. App. 1980).

CONCLUSION

Based upon the foregoing arguments the respondents respectfully move this Court to deny the writ of certiorari and to dismiss the petition.

Respectfully submitted,

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was secret and without warning, was itself an act of retaliation by the petitioner. This in turn casts Spellman's and Connor's acts in an entirely different light. In the course of balancing rights and equities the respondents were entitled to the "widest net" cast by qualified immunity, and it cannot be said that the holdings below deviated from the federal law of qualified immunity. More importantly, the decisions below did not purport to set up a new test for immunity or create any conflicts of law.

V. THE PETITIONER IMPROPERLY REPRESENTS THE STATE LAW NOTICE OF CLAIM ISSUE AS INVOLVING A QUESTION OF FEDERAL LAW.

A. The Petitioner Failed To Comply With The Wisconsin Notice Of Claim Statute.

Section 893.82(3), Wis. Stats., provides in part:

> Except as provided in sub (5m)[medical malpractice], no civil action or civil proceeding may be brought against any state officer, employee or agent. . . unless within 120 days of the event causing the injury . . . the claimant in the action or proceeding serves upon the attorney general written notice of a claim . . . .

Compliance with the notice statute is a condition precedent to a suit against a state employee; it is jurisdictional in nature and, therefore, is not waived by failing to raise it as an affirmative defense. Ibrahim v. Samore, 118 Wis. 2d 720, 726, 348 N.W.2d 554 (1984).

The duty of compliance is strictly construed against the plaintiff and is liberally construed in favor of the defense; sec. 893.82(2m) provides:

> No claimant may bring an action against a state officer, employee or agent unless the claimant complies strictly with the requirements of this section.

In Kashishian v. Port, 167 Wis. 2d 24, 51-52, 481 N.W.2d 277 (1992), suit was barred for failure to timely file the notice of claim even if the date an Assistant Attorney General had actual notice also marked the beginning of the notice period. Substantial compliance is insufficient to meet the terms of the statute. Kelly v. Reyes, 168 Wis. 2d 743, 747, 484 N.W.2d 388 (Ct. App. 1992). It is irrelevant that the state has not been prejudiced. Carlson v. Pepin County, 167 Wis. 2d 345, 357, 481 N.W.2d 498 (Ct. App. 1992). In 519 Corp. v. DOT, 92 Wis. 2d 276, 284 N.W.2d 643 (1979), the court said:

> Uniformity, consistency, and compliance with procedural rules are important aspects of the administration of justice. If the statutory prescriptions to obtain jurisdiction are to be